

## SUPREME COURT OF THE UNITED STATES

RICHARD P. CHRISTY, ET AL., PETITIONERS *v.* MA-  
NUEL LUJAN, JR., SECRETARY OF THE INTERIOR  
AND UNITED STATES DEPARTMENT  
OF THE INTERIOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-1461. Decided June 12, 1989

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioner is a herder who grazed his sheep on leased land near Glacier National Park. Between July 1 and July 9, 1982, grizzly bears from the park killed 20 of petitioner's sheep. Requests for assistance from park rangers yielded no results, and efforts to frighten away the bears were unsuccessful. On July 9, when two grizzlies emerged from the forest and approached petitioner's sheep, he shot and killed a bear. Grizzlies, however, are "endangered species;" petitioner's killing of the bear thus violated the Endangered Species Act, which makes it unlawful to "harass, harm pursue, hunt, shoot, wound, kill, trap, capture, or collect" grizzlies and other animals protected by the statute. 16 U. S. C. § 1538(a)(1). Petitioner was consequently assessed a \$2,500 penalty for shooting the bear.

Petitioner then filed this action in District Court, seeking to enjoin enforcement of the Act against herders like himself, and resisting payment of the \$2,500 penalty. Petitioner claimed, *inter alia*, that his actions in defense of his livestock were protected by the Due Process Clause of the Fifth Amendment; alternatively, petitioner contended that the Act resulted in an uncompensated "taking" of his property. Both the District Court and the Ninth Circuit rejected these claims, and this petition ensued.

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I would grant the petition for certiorari to consider petitioner's constitutional claims. Petitioner's claim of a constitutional right to defend his property is not insubstantial. A man's right to defend his property has long been recognized at common law, see W. Blackstone, Commentaries \*138-140, and is deeply-rooted in the legal traditions of this country, see, *e. g.*, *Beard v. United States*, 158 U. S. 550, 555 (1895). Having the freedom to take actions necessary to protect one's property may well be a liberty "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of Powell, J.), and therefore, entitled to the substantive protection of the Due Process Clause. In any event, petitioner's claim to such protection presents an interesting and important question—the proper resolution of which is not altogether clear—that merits plenary review.

Even more substantial is petitioner's claim that the Endangered Species Act operates as a governmental authorization of a "taking" of his property; leaving him uncompensated for this taking violates the Fifth Amendment, petitioner contends. There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner's livestock to feed the bears, such a governmental action would constitute a "taking." The Court of Appeals below, and the United States in its submission here, distinguish such a case from this one, by noting that the United States "does not 'own' the wild animals it protects, nor does the government control the conduct of such animals." 857 F. 2d 1324, 1335 (CA9 1988); see Brief of the Respondents 7.

Perhaps not; but the government does make it unlawful for petitioner to "harass, harm, [or] pursue" such animals when they come to take his property—and perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place. Thus, if the government decided (in lieu of the food stamp program) to enact a law barring grocery store

owners from "harassing, harming, or pursuing" people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in petitioner's case.

In sum, sustaining grizzly bears is a worthwhile and important governmental objective. But it "is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 304, 318-319 (1987) (quoting *Armstrong v. United States*, 364 U. S. 40, 49 (1960)). Here, petitioner has been asked to bear the burden of feeding endangered grizzlies—or at the least, has been estopped from taking measures necessary to prevent the use of his property for this purpose. Thus, it seems quite possible that petitioner has been denied the Fifth Amendment's protection against uncompensated takings.

Because I think that petitioner's constitutional claims present interesting and important questions that merit our attention, I dissent from the Court's denial of review in this case.